IN THE

Supreme Court of the United States

October Term, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the NEW YORK GASLIGHT CLUB, INC.,

Petitioners,

against

Ms. CIDNI CAREY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION BY NEW YORK STATE DIVISION OF HUMAN RIGHTS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR NEW YORK STATE ATTORNEY GENERAL AND NEW YORK STATE DIVISION OF HUMAN RIGHTS AS *AMICI CURIAE*

ROBERT ABRAMS
Attorney General of the
State of New York
Appearing *Pro Se*
2 World Trade Center
New York, New York 10047
(212) 488-5161

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-5365

SHIRLEY ADELSON SIEGEL
Solicitor General

JUDITH T. KRAMER
Assistant Attorney General
Acting Chief of the Civil
Rights Bureau

ARNOLD FLEISCHER
BARBARA LEVY
Assistant Attorneys General
Of Counsel

ADELE GRAHAM
State Division of Human Rights
Of Counsel

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC. and JOHN ANDERSON,
Manager of the NEW YORK GASLIGHT CLUB, INC.,

Petitioners,

against

MS. CIDNI CAREY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The New York State Division of Human Rights hereby moves this Court to accept for filing the attached proposed *amicus curiae* brief, jointly presented by the New York State Attorney General and the New York State Division of Human Rights, as *amici curiae*.

Consent to the filing of a brief *amicus curiae* by the New York State Division of Human Rights was granted by

James I. Meyerson, Esq. counsel for respondent Ms. Cidni Carey, by letter dated December 18, 1979.

Consent to the filing of a brief *amicus curiae* by the New York State Division of Human Rights was declined orally by Albert N. Proujansky, Esq. counsel for petitioners New York Gaslight Club, Inc. and John Anderson.

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights
Two World Trade Center
New York, New York 10047
(212) 488-5365

ADELE GRAHAM
Of Counsel

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC. and JOHN ANDERSON, Manager of the NEW YORK GASLIGHT CLUB, INC.,

Petitioners,

against

Ms. CIDNI CAREY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NEW YORK STATE ATTORNEY GENERAL AND NEW YORK STATE DIVISION OF HUMAN RIGHTS, AS *AMICI CURIAE*

Interest of *Amici Curiae*

The *amicus* Attorney General, pursuant to his responsibilities as chief legal officer of the State under New York State Executive Law § 63, has a vital interest in protecting

the citizens of the State by insuring effective enforcement of the laws prohibiting discrimination in employment.

Pursuant to its authority under the Human Rights Law, Article 15 of the New York Executive Law ("HRL"), and as the nation's oldest fair employment practices commission, entrusted since 1945 with enforcement of the New York anti-discrimination statute, the interest of the *amicus* State Division of Human Rights ("Division") is to provide the Court with an accurate account of the law and the Division's rules and practices. The Division has an obvious interest also in maximizing the effectiveness of its efforts to enforce State law prohibiting discrimination.

The issue before this Court in the above-entitled action has serious implications for enforcement of State law against discrimination.

Until the Second Circuit's decision below, victims of discrimination in employment in the State of New York who chose to pursue their legal rights and remedies faced a dilemma. Under Section 706 of Title VII of the Civil Rights Act of 1964, 42 USC 2000e-5(c), such persons are required to initiate their complaints with the Division. Complainants appearing before the Division *pro se* confront respondent employers customarily represented by counsel. Complainants who obtained private legal assistance, even if successful, could not recover under New York State law the money spent on legal fees. Their only opportunity to recoup such fees was to abandon their State complaints completely after reaching the final stage of the State administrative process and to reassert all of their substantive claims in a new proceeding commenced in a federal forum. If they were then successful, attorney's fees would be granted. This two-step procedure placed an unconscionable burden upon already victimized complainants by forcing them to resubmit their proof in a second action.

The decision below, if sustained by this Court, by encouraging complainants to the Division to obtain private counsel at an early stage of the case, will result not only in more frequent vindication of complainants' rights, but also will avoid extensive litigation before the Division through more realistic evaluation of the case for purposes of commencing an action or efforts at settlement.

ARGUMENT

The granting of counsel fees by federal courts to private attorneys who have successfully represented complainants before the Division is sanctioned by law and public policy.

Title VII provides that an appropriate state or local agency be given the first opportunity to resolve complaints in jurisdictions where a state or local law prohibits the alleged unlawful employment practice. 42 USC § 2000e-5(c). Such deferral is consistent with according the highest priority to the national policy against discrimination. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36, 47 (1974).

In the State of New York, the Division is an appropriate deferral agency. Division attorneys do not, however, represent the complainant in administrative proceedings brought pursuant to the Human Rights Law. While this was correctly recognized by the majority of the Court below, it was misunderstood by both the dissenting judge below and by the judge in the Southern District of New York.[1] Judge Werker's statement that "The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services" inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices.

When a complaint is filed and investigated, the Human Rights Law makes no provision for the appearance of a Division attorney, nor do the Division's Rules of Practice, Title 9 New York Code of Rules and Regulations, part 465 ("NYCRR"), sanction such activity. Section 297.1 does,

1. An argument perpetuating this serious misunderstanding has been advanced by petitioners on pp. 6-7 of their brief. Petitioners, in relying upon a misquoted section of the HRL, argue that the State of New York provides for the "prosecution of complaints." In failing to cite the section accurately, and substituting the term *complaint* for *complainant*, petitioners have also failed to grasp the basic reason why complainants require the assistance of private counsel, to present "the case in support of the complainant."

Petitioners further this misunderstanding by their reference on p. 6 of their brief to § 297.4(a) as antecedent to Title VII. In fact, prior to 1964, Article 15 of the N.Y. Executive Law did not provide for the appearance of private counsel. The complainant, in person or by counsel, was permitted only to "intervene" at the hearing in the discretion of the Division. New York Laws of 1945, ch. 118, § 1. The present language of the Human Rights Law, recognizing complainants as parties, was enacted in 1968. N.Y. Session Laws of 1968, ch. 958, § 6.

however, provide for the participation of private counsel, and private counsel frequently represent complainants during this early stage, where either a finding of probable cause or dismissal for no probable cause is made (HRL § 297.2). The finding of probable cause after investigation is a necessary prelude to the public hearing. At no time is a complainant represented by a Division attorney at this preliminary level.

Investigation is followed by attempts at conciliation, still with no Division attorney present. The Division staff is empowered, with unreviewable discretion, to execute a conciliation agreement reached with the respondent and to dismiss the complainant's objections thereto for administrative convenience (HRL § 297.3).

If no conciliation is reached and a hearing is scheduled, a Division attorney appears if the complainant has not retained private counsel. Consent to the presentation of the complaint solely by private counsel is granted routinely and informally unless there is a substantial public interest. The Division's Rules of Practice, 9 NYCRR pt. 465.11, were revised in 1977 to reflect this new practice.

In any event, the Division attorney does not represent the complainant in settlement discussions taking place at a hearing. Stipulations may be demanded by respondents which affect a complainant's rights and interests beyond the complaint to the Division. A demand commonly made by respondents as a term of settlement is the execution by complainant of a written release of all existing claims, state and federal, against the company, and the withdrawal

of a charge before the Equal Employment Opportunity Commission. The Division attorney is not in a position to advise a complainant whether to sign such a release.

Finally, at the appellate level, the Division attorney appears to support orders issued by the Division and the State Human Rights Appeal Board and to seek enforcement pursuant to HRL § 298. The Division attorney represents only the Division and the Commissioner, and cannot represent a complainant on an appeal from an order of the Commissioner adverse to the complainant. The complainant must appeal from such an order either by private counsel or *pro se*.[2] See *Mize* v. *State Division of Human Rights,* 33 N.Y. 2d 53 (1973); *Molin* v. *State Division of Human Rights,* —— A.D. 2d ——, 359 N.Y.S. 2d 241 (2d Dept. 1974); *Metropolitan Transportation Authority* v. *State Division of Human Rights,* 50 A.D. 2d 821 (2d Dept. 1975). In addition, the Division cannot appeal from an order of the State Human Rights Appeal Board reversing the Division order. *State Division of Human Rights* v. *State Human Rights Appeal Board,* —— A.D. 2d —— (4th Dept.), *mot. for lv. to app. den.,* 46 N.Y. 2d 705 (1978). A complainant aggrieved by the Board's reversal must seek private counsel or act *pro se* to pursue judicial review.

2. In *Sinicropi* v. *Nassau County,* 601 F. 2d 60 (2d Cir.), cert. denied, 48 U.S.L.W. 3372 (Dec. 4, 1979), the Court dismissed a *pro se* federal complaint brought pursuant to Title VII on grounds of *res judicata* after the Division and the New York appellate courts had dismissed an identical *pro se* complaint. Thus, complainants litigating without counsel in New York tribunals may be put at an ever greater disadvantage. See also *Kremer* v. *Chemical Construction Corp.,* 477 F. Supp. 587 (S.D.N.Y. 1979).

State Division of Human Rights v. *Department of Correctional Services,* 61 A.D. 2d 25 (4th Dept. 1978).[3]

From the foregoing recital it is apparent how limited is the representation given to a complainant by the legal staff of the State Division. The existence of Title VII, and the strong body of case law under that enactment, have given rise to several pertinent phenomena in recent years:

1. An extreme increase in caseload, a "doubling and redoubling" (affidavit of Adele Graham, A58, A59);
2. The almost invariable participation by experienced attorneys representing respondents at all phases of

3. The chart below summarizes and clarifies the roles of the Division and private attorneys in Human Rights Law actions:

Stage	*Division Attorney Participation*	*Private Attorney Participation*
1. File Complaint		x
2. Investigation		x
3. Conciliation		x
4. Public Hearing with Private Attorney		x
4a. Public Hearing, No Private Attorney	x	
4b. Public Hearing, Substantial Public Interest	x	x
5. Appeal to Appeal Board from Favorable Order After Hearing	x	x
6. Appeal to Appeal Board from Unfavorable Order After Hearing		x
7. Appeal to Court from Order After Hearing Sustained by Board	x	x
8. Appeal to Court from Order After Hearing Reversed by Board		x

the Division proceedings, from investigation to conciliation to hearing to appeal; and

3. The rise of a complainants' bar.

During this same period of increasing demand on Division attorneys' time and on the State's financial resources, well-documented budgetary problems have prevented staff increases necessary to handle the increased caseload. Of necessity, the Division supports and encourages the participation of private counsel.

The State's inability to supply legal assistance at all stages of the compaint processing makes the award of attorney's fees by federal courts to lawyers representing prevailing complainants in Division proceedings a necessary, logical and appropriate conclusion to such proceedings consistent with the integrated federal-state scheme embodied in Title VII. *Love* v. *Pullman,* 404 U.S. 522 (1972); *Marshall* v. *Communication Workers of America,* 21 Empl. Prac. Dec. (CCH) ¶ 30,318 (D. D.C. 1979). See *Noble* v. *Claytor,* 448 F. Supp. 1242, 1248 (D. D.C. 1978); *Parker* v. *Califano,* 561 F. 2d 320 (D.C. Cir. 1977); *Bucyrus-Erie Co.* v. *Dept. of Industry,* 549 F. 2d 205 (7th Cir. 1979), *pet. for cert. filed,* 48 U.S.L.W. 3181 (U.S. Aug. 16, 1979) (No. 79-258).

Where a state anti-discrimination statute does not provide for the award of attorneys' fees, their award by a federal court is a corollary remedy.[4] "To require deferral to a

4. Petitioners, citing *State Division of Human Rights* v. *Luppino,* 29 N.Y. 2d 558 (1971), state that the New York State Court of Appeals "did not believe" that § 706(k) of the Civil Rights Act of

(footnote continued on next page)

state for sixty days during which it may provide those forms of relief available under its law does not deprive a litigant of a later opportunity to seek in a federal forum relief not available in the state scheme (citation omitted) . . . [nor does it] require a state to 'clone' federal remedies." *White* v. *Dallas Independent School District,* 581 F. 2d 556, 561 (5th Cir. 1978). See *Oscar Mayer and Co.* v. *Evans,* —— U.S. ——, 99 S.Ct. 2066 (1979).

Failure to award attorney's fees in an action of this nature would bring about the anomalous result that persons discriminated against in states where no deferral agency existed could get complete relief, including attorney's fees, not available to persons in states with deferral agencies which either did not or could not award such fees. *Parker* v. *Califano,* 561 F. 2d 320, 329 n.24 (D.C. Cir. 1977); *Foster* v. *Boorstin,* 561 F. 2d 340, 343 n.8 (D.C. Cir. 1977); *Fischer* v. *Adams,* 572 F. 2d 406, 410 (1st Cir. 1978).

1964, 42 U.S.C. § 2000e-5(k) applied to cases litigated in state court. To our knowledge, this issue has never been raised in a New York State court. In fact, *Luppino, supra,* did not even contain the issue of whether counsel fees should be granted. However, counsel fees are not awarded by the Division under New York State law. See *State Commission for Human Rights* v. *Speer,* 35 A.D. 2d 107 (2nd Dept. 1970), *rev'd on other grounds,* 29 N.Y. 2d 555 (1971).

Conclusion

For the above stated reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, New York
December 27, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Appearing *Pro Se*

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights

SHIRLEY ADELSON SIEGEL
Solicitor General

JUDITH T. KRAMER
Assistant Attorney General
Acting Chief of the Civil
Rights Bureau

ARNOLD FLEISCHER
BARBARA LEVY
Assistant Attorneys General
Of Counsel

ADELE GRAHAM
State Division of Human Rights
Of Counsel